Supreme Court of the United States

October Term, 1962.

No. 788

KEYSTONE COAT & APRON MFG. CORP.,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

EDWIN J. MCDERMOTT,
Counsel for Petitioner,
1901 Three Penn Center Plaza,
Philadelphia 2, Pa.

I. F. Huntzinger Co., *Appellate Printers,* Camden, N. J.

TABLE OF CONTENTS

	PAGE
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Allowance of the Writ	4
Conclusion	8
Appendix A:	
Order of Court of Claims Entering Judgment	9
Appendix B:	
Constitution of the United States of America:	
Article III, Section 1	10
Amendment 5	10
Amendment 7	11
28 U. S. C. §2503	11
28 U. S. C. §2508	12

TABLE OF CITATIONS

CASES:

Ayrshire Corp. v. United States, 1947, 331 U. S. 132	4
Benner v. Porter, 1850, 9 How. 235	7
Charles v. United States, 1937, 86 Ct. Cl. 168	6
Evans v. Gore, 1920, 253 U. S. 245	7

TABLE OF CONTENTS

	PAGE
Ex Parte Bakelite Corp., 1929, 279 U. S. 438	5
Glidden Company v. Zdanok, 1962, 370 U. S. 530	5, 6, 7
Kilbourn v. Thompson, 1881, 103 U. S. 168	4
King Bridge Co. v. Otoe County, 1887, 120 U. S. 225	8
LaBuy v. Howes Leather Co., 1957, 352 U. S. 249	6
Lurk v. United States, 1961, 366 U. S. 712	8
M. C. & L. M. Railway Co. v. Swan, 1884, 111 U. S. 379	8
McElrath v. United States, 1880, 102 U. S. 426	5
National Ins. Co. v. Tidewater Co., 1949, 337 U. S. 582	6
O'Donoghue v. United States, 1933, 289 U. S. 516	7
Todd v. United States, 1895, 158 U. S. 278	6
Toth v. Quarles, 1955, 350 U. S. 11	6
United States v. Corrick, 1936, 298 U. S. 435	7
United States v. Emholt, 1882, 105 U. S. 414	7.
United States v. Sherwood, 1941, 312 U. S. 584	4, 5
Williams v. United States, 1933, 289 U. S. 553	4, 5

CONSTITUTIONAL PROVISIONS AND STATUTES:

Constitution of the United States of America, Article III, Section 1	4, 5, 6, 7, 10
Amendment 5	2, 10
Amendment 7	2, 11
68 Stat. 1246, 28 U. S. C. §2503	2, 6, 10
67 Stat. 227, 28 U. S. C. §2508	2, 12
68 Stat. 1240, 28 U. S. C. §792(a)	6

RULE:

Rule 37a, Rules of the Court of Claims (1957), 140 Ct. Cl. 1, 46	6

SUPREME COURT OF THE UNITED STATES.

October Term, 1962.

No.

KEYSTONE COAT & APRON MFG. CORP.,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Keystone Coat & Apron Mfg. Corp. prays that a writ of certiorari issued to the Court of Claims to review the judgment of the Court of Claims entered herein on November 16, 1962. No opinion was filed by the Court of Claims. By order of the Court (not reported) judgment was entered for respondent in the sum of $5,883.64. A report of Commissioner Roald A. Hogenson was filed with the Court of Claims, Tr. pp. 33-51. The order of the Court entering judgment is set forth at page 9, Appendix A.

JURISDICTION.

The Statutory provision conferring jurisdiction on this Court is found at 62 Stat. 928, 28 U. S. C. §1255(1).

QUESTIONS PRESENTED.

1. Does not the Seventh Amendment require a jury trial of a counterclaim on the part of the United States against petitioner making claim against the United States in the Court of Claims?

2. May a counterclaim on the part of the United States against petitioner making claim against the United States in the Court of Claims be heard and determined by a Commissioner of the Court of Claims, instead of a Judge constituted under Article III of the Constitution?

3. Is not a Court of Claims judgment entered on a counterclaim against petitioner and in favor of the United States, upon consideration of the pleadings, the report of the Commissioner, and respondent's brief, void and violative of due process?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States, Article III, Section 1, Amendments 5 and 7 are set forth at pages 10 and 11, Appendix B to this petition. 68 Stat. 1246, 28 U. S. C. §2503; 67 Stat.

227, 28 U. S. C. 2508 are set forth at pages 11 and 12, Appendix B to this petition.

STATEMENT OF THE CASE.

Petitioner commenced this action in the Court of Claims to recover the sum of $1,719.38 due it for 875 pairs of trousers delivered by petitioner to respondent under Navy contract N140(62236)-55279B. Respondent by answer admitted that petitioner had delivered said trousers to it under said contract but denied that petitioner was entitled to recover by reason of petitioner's alleged indebtedness of $6,936.39 to respondent arising out of another Navy contract No. DA30-356-TAP-670 for the manufacture of enlisted men's white trousers from Government material furnished by the Department of the Navy on the ground that thereunder petitioner had agreed to reimburse the Government at an agreed price for scrap generated in cutting parts for trousers from Government furnished material, but had failed to account, and pay, for $6,936.39 worth of scrap. The case was referred by the Court of Claims to Commissioner Roald A. Hogenson and after trial he filed a report of his findings of fact with the Court of Claims, therein determined disputed issues of fact, depending upon conflicting testimony, and found that petitioner had failed to account for 63,058.12 pounds of scrap cloth generated in the performance of the contract and that respondent was entitled to recover $6,936.39 therefor on its first counterclaim, Tr. pp. 33-51. Respondent had other counterclaims in the aggregate amount of $666.63 under contract No. DA30-352-TAP-1573 found due by the Armed Services Board of Contract Appeals, to which petitioner agreed. Petitioner did not file any brief after the Commissioner's Report was filed. Respondent filed a brief before the Court.

On November 16, 1962, the Court of Claims entered judgment for respondent in the sum of $5,883.64, upon consideration of the pleadings, the Commissioner's report, and defendant's brief (Appendix A, pages 9 and 10). The Court made no findings of fact or determination.

REASONS FOR ALLOWANCE OF THE WRIT.

The judgment of the Court of Claims in favor of respondent on its counterclaim is void because the counterclaim was not heard by a judge or by a jury.

It is submitted that the entry by the Court of Claims of the counterclaim judgment upon the report of the Commissioner deprived petitioner of its property without due process of law in violation of the Fifth Amendment: *Kilbourn v. Thompson*, 1881, 103 U. S. 168. It is submitted that the judgment on respondent's counterclaim having been entered on the finding and determination of a Commissioner and not on the finding and determination of a judge constituted under Article III of the Constitution, is void: *Ayrshire Corp. v. United States*, 1947, 331 U. S. 132, 135. It is further submitted that petitioner was entitled to a jury trial of respondent's counterclaim, and the entry of judgment against it by the Court of Claims on such counterclaim without a jury trial, was void.

The issue as to whether counterclaims by respondent in the Court of Claims require a jury trial should be settled by the Court. The last decision, *United States v. Sherwood*, 1941, 312 U. S. 584, 587, ruled that despite the Seventh Amendment, jury trials in suits in the Court of Claims could be dispensed with because the Court of Claims was a legislative, not a constitutional court, citing *Williams v. United*

States, 1933, 289 U. S. 553, 569, 570, 571; *Ex parte Bakelite Corp.*, 1929, 279 U. S. 438, 452, 453; and *McElrath v. United States*, 1880, 102 U. S. 426.

But in *Glidden Company v. Zdanok*, 1962, 370 U. S. 530, the Court declared the Court of Claims to have been created under Article III of the Constitution and not to be a legislative Court created under Article I of the Constitution, and the authority of *Williams v. United States*, supra, was questioned.

McElrath v. United States, supra, 102 U. S. at page 440, declared that suits against respondent in the Court of Claims or counterclaims which respondent may assert therein are not controlled by the Seventh Amendment, not being suits at common law within its true meaning. But as the Court said in *United States v. Sherwood*, supra, 312 U. S. at page 587, this was for the reason that the Court of Claims was then considered a legislative, *not* a constitutional, court. In view of the Court's decision in *Glidden Company v. Zdanok*, supra, that the Court of Claims is an Article III court,[1] and that suits against respondent, and of course counterclaims by respondent, at the time of the Constitution were recognized to be traditionally within the power of Courts in the English and American judicial systems,[2] it is submitted that the rendition by the Court of Claims of judgment against petitioner upon respondent's counterclaim, without a jury trial, was violative of the Seventh Amendment.

It is submitted that the doctrine of *McElrath v. United States*, supra, should in any event not be extended to allow the Court of Claims to render judgment against petitioner upon respondent's counterclaim heard only by a Commis-

---

[1] 370 U. S. at page 558.

[2] 370 U. S. at page 563.

sioner of the Court of Claims and not by a Judge constituted under Article III of the Constitution; judicial power defined in Article III of the Constitution is expressly and solely vested in virtue of Article III and may not be otherwise vested: *Toth v. Quarles*, 1955, 350 U. S. 11, 23.

It is submitted that the trial and determination of respondent's counterclaim by a Commissioner of the Court of Claims was in the light of *Glidden Company v. Zdanok*, supra, improper. The Commissioners of the Court of Claims are appointed by the Court of Claims and are subject to removal by the Court of Claims: 68 Stat. 1240; 28 U. S. C. §792(a).

Clearly, a Court of Claims Commissioner is not a Judge of a constitutional court under Article III. See *Todd v. United States*, 1895, 158 U. S. 278 (a commissioner of a District Court); *Charles v. United States*, 1937, 86 Ct. Cl. 168 (a referee in bankruptcy).

It is true that in *Glidden Company v. Zdanok*, supra, 370 U. S. at page 572, the Opinion by Mr. Justice Harlan likened the provision in 28 U. S. C. §2503 for Court of Claims Commissioners to take evidence and make preliminary rulings, to the practice of masters in chancery[3] and referred to the judicial quality of the proceedings before Commissioners under the revised rules of the Court of Claims. But the granting of a judicial quality does not constitute a Court of Claims Commissioner a Judge under Article III of the Constitution. He serves only by appointment from the

---

[3] In District Court practice, however, trial by the Court prevails: **LaBuy v. Howes Leather Co.**, 1957, 352 U. S. 249, 258, "Litigants are entitled to trial by the courts, in every suit, save where exceptional circumstances are shown". In the Court of Claims every case is referred to a Commissioner for trial of the facts, unless otherwise ordered by the Court: Rule 37a, Rules of the Court of Claims (1957), 140 Ct. Cl. 1, 46. Constitutional principles relating to the jurisdiction of Article III courts should not be sacrificed on the "altar of expediency": **National Ins. Co. v. Tidewater Co.**, 1949, 337 U. S. 582, 645.

Court of Claims and at its pleasure is subject to removal. The quality of tenure under Article III of the Constitution does not belong to the Court of Claims Commissioner. As stated in *Benner v. Porter*, 1850, 9 How. 235, 244, Judges seeking to exercise the power of Article III Courts must, possess the constitutional tenure of office before they can become invested with any portion of the judicial power. There is no exception to this rule to the Constitution. Such investiture never occurred in Commissioner Hogenson's case. Petitioner's right to a trial on respondent's counterclaim before an Article III Judge means a trial before a Judge constitutionally protected as to tenure and compensation. See *Glidden Company v. Zdanok*, supra, 370 U. S. at page 584.

Those protections of Article III as *Evans v. Gore* 1920, 253 U. S. 245, 253, makes plain, are to be construed, not as a private grant, but as a limitation imposed in the public interest. See also *O'Donoghue v. United States*, 1933, 289 U. S. 516, 533. These are constitutional provisions, therefore, which members of the public may insist be observed, when they are subjected to trial in a federal court. Certainly petitioner against whom respondent filed a counterclaim has such right. This Court has never passed upon this question.

It has been held that if a Court lack jurisdiction, that jurisdiction cannot be waived by consent of the parties: *United States v. Corrick*, 1936, 298 U. S. 435, 440; *United States v. Emholt*, 1882, 105 U. S. 414, 416. Even though petitioner failed to file a brief and raise the point of lack of jurisdiction of the Court of Claims, it is submitted that the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this Court, of its own motion, and in the exercise of its appellate power, to deny the jurisdiction of the Court below: *Glidden Company v. Zdanok*,

supra, 370 U. S. at pages 535-537; *M. C. & L. M. Railway Co. v. Swan*, 1884, 111 U. S. 379, 382; *King Bridge Co. v. Otoe County*, 1887, 120 U. S. 225, 226; *Lurk v. United States*, 1961, 366 U. S. 712, 713-714, dissenting opinion by Mr. Justice Frankfurter, joined by Mr. Justice Harlan and Mr. Justice Stewart.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

EDWIN J. McDERMOTT,
Attorney for Petitioner.

APPENDIX A.

ORDER OF THE COURT OF CLAIMS ENTERING JUDGMENT.

IN THE

UNITED STATES COURT OF CLAIMS.

No. 524-56.

KEYSTONE COAT & APRON MFG. CORP.

v.

THE UNITED STATES

ORDER.

This case comes before the court on the petition of the plaintiff, the counterclaims of the defendant, the report of Trial Commissioner Roald A. Hogenson, and defendant's brief, it appearing to the court that plaintiff has failed to file a brief, the time therefor having expired. Upon consideration thereof, it is concluded that plaintiff is entitled to recover the sum of $1,719.38 on its petition and defendant is entitled to recover $6,936.39 on its first counterclaim plus the sum of $666.63 on its second and third counterclaims,

and, offsetting plaintiff's recovery against defendant's recovery.

IT IS ORDERED that judgment be and the same is entered for the defendant in the net sum of five thousand eight hundred eighty-three dollars and sixty-four cents ($5,883.64).

BY THE COURT,

/s/ MARVIN JONES,
Chief Judge.

Nov. 16, 1962.

APPENDIX B.

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

AMENDMENT 5—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indict-

ment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 7—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

TITLE 28 U. S. C.

§2503. Proceedings before commissioners generally

(a) Parties to any suit in the Court of Claims may appear before a commissioner in person or by attorney, produce evidence and examine witnesses. In accordance with rules and orders of the court, commissioners shall fix times for trials, administer oaths or affirmations to and examine witnesses, receive evidence and report findings of fact and, when directed by the court, their recommendations for conclusions of law in cases assigned to them. Hearings shall, if convenient, be held in the counties where the witnesses reside.

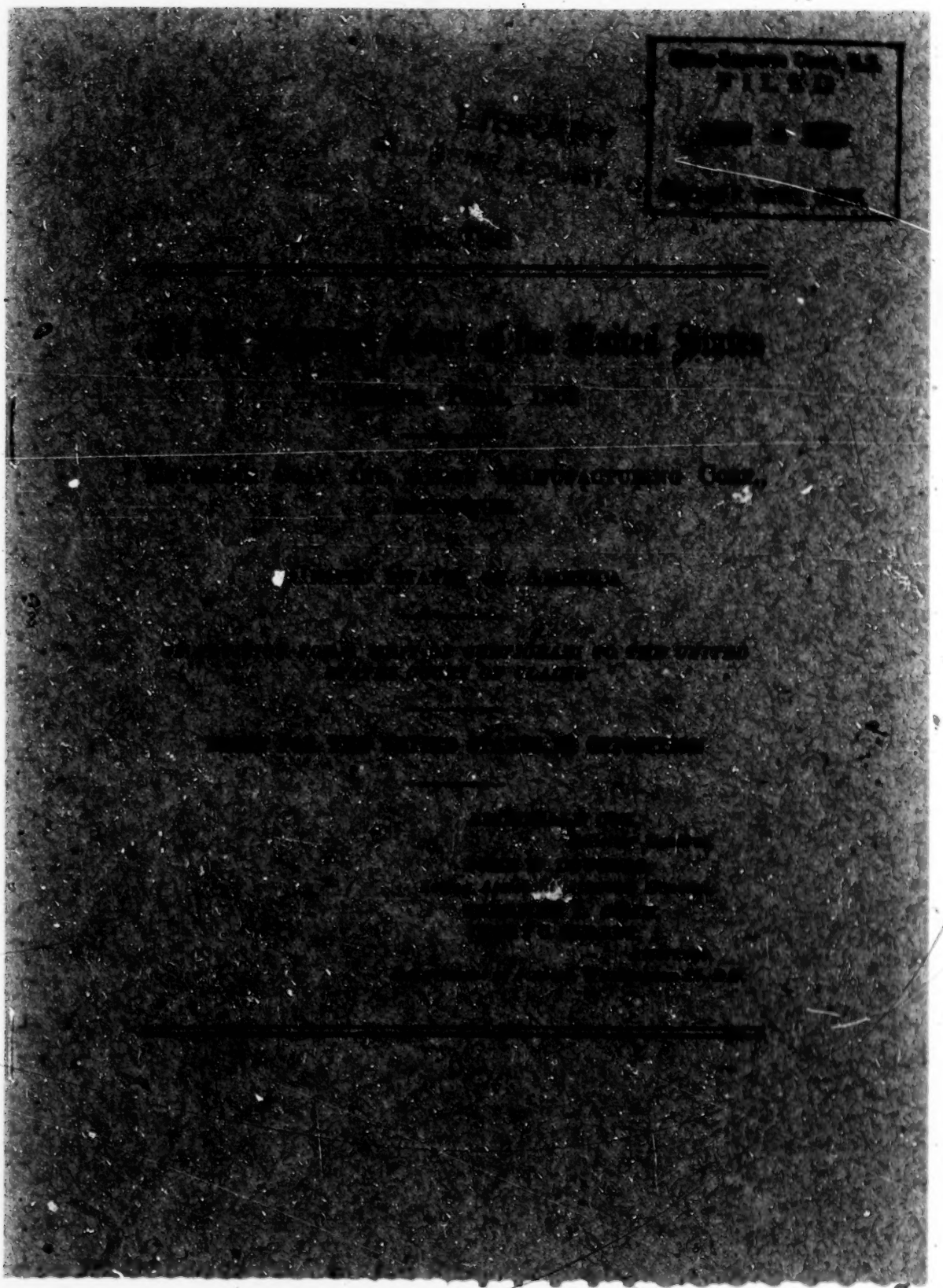
(b) The rules of the court shall provide for the filing in court of the commissioner's report of facts and recommendations for conclusions of law, and for opportunity for the parties to file exceptions thereto, and a hearing thereon before the court within a reasonable time. This section shall not prevent the court from passing upon all questions and findings regardless of whether exceptions were taken before a commissioner. As amended Sept. 3, 1954, c. 1263, §53, 68 Stat. 1246.

§2508. Counterclaim or set-off; registration of judgment

Upon the trial of any suit in the Court of Claims in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.

If upon the whole case it finds that the plaintiff is indebted to the United States it shall render judgment to that effect, and such judgment shall be final and reviewable.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments. As amended July 28, 1953, c. 253, §10, 67 Stat. 227; Sept. 3, 1954, c. 1263, §47(a), 68 Stat. 1243.



INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Constitutional provisions and statutes involved	2
Statement	4
Argument	5
Conclusion	8

CITATIONS

Cases:	
Adams v. *United States ex rel. McCann*, 317 U.S. 269	5
Glidden Co. v. *Zdanok*, 370 U.S. 530	6–7, 8
Kearney v. *Case*, 12 Wall. 275	5
McElrath v. *United States*, 102 U.S. 426	6
United States v. *Sherwood*, 312 U.S. 584	6
Constitution and statutes:	
Constitution of the United States:	
Article III	2
Seventh Amendment	2, 5
28 U.S.C. 2503	3
28 U.S.C. 2503(a)	3
28 U.S.C. 2503(b)	3, 8
28 U.S.C. 2508	3, 6

677304—63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 788

KEYSTONE COAT AND APRON MANUFACTURING CORP.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the Court of Claims was entered without opinion (Pet. App. A, 9-10).

JURISDICTION

The judgment of the Court of Claims was entered on November 16, 1962. The petition for a writ of certiorari was filed on February 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether a plaintiff may assert in this Court that it was unconstitutionally denied a jury trial on

the government's counterclaim in the Court of Claims, when it did not request a jury during the proceedings before the Court of Claims.

2. Whether the Seventh Amendment requires a jury trial on a counterclaim by the United States against a plaintiff in the Court of Claims.

3. Whether petitioner was denied a judicial trial in violation of Article III of the Constitution when the counterclaim of the United States against it was decided by a Commissioner of the Court of Claims.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III of the Constitution provides in pertinent part:

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> * * * * * *

The Seventh Amendment of the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Section 2503 of Title 28 U.S.C. provides:

28 U.S.C. 2503:

(a) Parties to any suit in the Court of Claims may appear before a commissioner in person or by attorney, produce evidence and examine witnesses. In accordance with rules and orders of the court, commissioners shall fix times for trials, administer oaths or affirmations to and examine witnesses, receive evidence and report findings of fact and, when directed by the court, their recommendations for conclusions of law in cases assigned to them. Hearings shall, if convenient, be held in the counties where the witnesses reside.

(b) The rules of the court shall provide for the filing in court of the commissioner's report of facts and recommendations for conclusions of law, and for opportunity for the parties to file exceptions thereto, and a hearing thereon before the court within a reasonable time. This section shall not prevent the court from passing upon all questions and findings regardless of whether exceptions were taken before a commissioner.

Section 2508 of Title 28 U.S.C. provides:

Upon the trial of any suit in the Court of Claims in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.

If upon the whole case it finds that the plaintiff is indebted to the United States it shall

render judgment to that effect, and such judgment shall be final and reviewable.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments.

STATEMENT

This suit was brought by petitioner in the Court of Claims to recover the sum of $1,719.38 due it under a contract with the Navy for 875 pairs of trousers to be delivered by petitioners (Pet. 3). The United States admitted liability but counterclaimed for $6,936.39. The government alleged that petitioner owed it that amount under a different contract providing that petitioner would reimburse the government, at an agreed price, for scrap cloth which resulted from cutting parts for trousers from government furnished material.[1] Petitioner denied liability on this claim (Pet. 3).

The United States moved for summary judgment on its counterclaim on the ground that petitioner had failed to take a timely appeal from a decision of the Contracting Officer under the "disputes clause" in the contract. The Court of Claims denied this motion on June 8, 1960, holding that there had been no decision

[1] The United States made various other counterclaims (Pet. 3), which were then the subject of appeals to the Armed Services Board of Contract Appeals. These appeals were decided adversely to the government except for a claim of $666.63. In its Second Amended Answer and Counterclaim, the United States reduced its demand on these other counterclaims to that sum and petitioner admitted liability (Pet. 3).

under the disputes clause and referred the case to a Commissioner for the resolution of specified factual issues. After trial, the Commissioner found in his report which he filed with the Court of Claims that the government was entitled to recover for the full amount of its counterclaim (Pet. 3). On November 16, 1962, the Court of Claims rendered a decision, without opinion, and ordered judgment entered for the government in the amount of $5,883.64. Petitioner filed no brief with the Court of Claims, and made no oral argument. At no time during the course of the proceedings before the Commissioner or before the Court of Claims did petitioner assert that he was constitutionally entitled to a jury trial, or even desired one, on the government's counterclaim, or that he was unconstitutionally denied a judicial hearing on the counterclaim (Pet. 7).

ARGUMENT

1. Petitioner contends that he was denied trial by jury in violation of the Seventh Amendment by the Court of Claims' determination of the government's counterclaim. Petitioner, however, never asked for a jury trial nor objected to the determination of the counterclaim by the Commissioner and finally the court during the proceeding in the Court of Claims. The right to a jury trial, where it exists, can of course be waived. *Kearney v. Case*, 12 Wall. 275, 281–82, 284; cf. *Adams v. United States ex rel. McCann*, 317 U.S. 269. We submit that petitioner's failure to demand a jury trial, or to take any action challenging the constitutionality of a determination

by the court below of the government's counterclaim without a jury, constituted a waiver of any right to a jury trial in this civil suit.

In any event, it has long been settled that there is no constitutional infirmity in the provision of 28 U.S.C. 2508 which permits the Court of Claims to "hear and determine" counterclaims by the United States without the intervention of a jury. As this Court held in *McElrath* v. *United States*, 102 U.S. 426, 440, this provision:

> informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counterclaim, or other demand of the government, upon which judgment may go against him, without the intervention of a jury * * *. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege.

Petitioner contends that the *McElrath* decision should be reexamined in the light of the recent decision in *Glidden Co.* v. *Zdanok*, 370 U.S. 530. It asserts (Pet. 4) that this Court stated in *United States* v. *Sherwood*, 312 U.S. 584, 587, that the constitutional basis for dispensing with jury trials in the Court of Claims is that the Court of Claims is a legislative and not a constitutional court. Therefore, petitioner argues (Pet. 5), the decision in *Zdanok* that the Court of Claims is a constitutional court is a tacit rejection of the *McElrath* rule.

The short answer to petitioner's contention is found in *Glidden Co.* v. *Zdanok* itself. There, the plurality

opinion of Mr. Justice Harlan expressly stated that the constitutionality of the procedure dispensing with jury trials on counterclaims by the government in the Court of Claims was not dependent on whether the Court of Claims was a constitutional or legislative court (370 U.S. at 572):

> A preliminary consideration that need not detain us long is the absence of provision for jury trial of counterclaims by the Government in actions before the Court of Claims. Despite dictum to the contrary in *United States* v. *Sherwood*, 312 U.S. 584, 587, the legitimacy of that nonjury mode of trial does not depend upon the supposed "legislative" character of the court. It derives instead, as indeed was also noted in *Sherwood*, *ibid.*, from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not "suits at common law" within the meaning of the Seventh Amendment. *McElrath* v. *United States*, 102 U.S. 426, 439–440. The Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims; the reasonableness of its later decision to obviate the need for multiple litigation precludes a finding that its imposition of amenability to nonjury set-offs was an unconstitutional condition. Cf. *Minneapolis & St. L.R. Co.* v. *Bombolis*, 241 U.S. 211; see 74 Harv. L. Rev. 414, 415 (1960).

2. Petitioner's argument that it was unconstitutionally denied a judicial proceeding on the government's counterclaim is also without merit. Referring the case to a Commissioner for a preliminary deter-

mination, as the plurality opinion noted in *Glidden Co. v. Zdanok, supra*, 370 U.S. at 572, is "conformable in all respects with the practice of masters in chancery." Concededly, Commissioners of the Court of Claims are not judges, but petitioner was not deprived of a hearing before a judge by the procedures of the Court of Claims. Although he chose not to do so (Pet. 3), it was open to petitioner to make exceptions to the report of the Commissioner, both through a brief and oral argument before the court.

Thus, contrary to petitioner's assumption (Pet. 6), the counterclaim was not "determin[ed]" by the Commissioner, but by the Court of Claims. The report of a Commissioner is advisory only (28 U.S.C. 2503(b)), and, in itself, has no effect on the rights of the parties. It was only when the Court of Claims entered judgment that a decision was made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Acting Assistant Attorney General.

SHERMAN L. COHN,
JERRY C. STRAUS,
Attorneys.

MARCH 1963.

U.S. GOVERNMENT PRINTING OFFICE 1963